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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-196

BENJAMIN A. JAVITS,

Petitioner,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

JOHN G. BONOMI
Attorney for Respondent
The Association of the Bar of the City of New York
Office & P.O. Address
36 West 44th Street
New York, N.Y. 10036
(212) 682-0606

INDEX

PAGE

Preliminary Statement 1

Statement of the Facts 2

ARGUMENT

I. A disciplinary proceeding is not a criminal case within the meaning of the constitution 13

II. Petitioner was not denied procedural due process 15

III. Appellate review of the order imposing discipline was available to petitioner 19

IV. Petitioner raises the equal protection argument for the first time in this Court 20

CONCLUSION 21

TABLE OF AUTHORITIES

Cases:

Ellis v. Dixon et al., Members of the Board of Education of the City of Yonkers, 349 U.S. 458 20

Ex Parte Wall, 107 U.S. 265, 288 (1882) 13

In Re Ruffalo, 390 U.S. 544 (1968) 15, 19

Lynch et al. v. N. Y. ex rel. Pierson, 293 U.S. 52 20

Constitutional Provision:

United States Constitution
Amendment XIV 20

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Preliminary Statement

This is a petition for a writ of certiorari to review the order of the Appellate Division, First Department, of the Supreme Court of the State of New York (hereinafter referred to as "the Appellate Division"), made and entered on January 5, 1971, suspending petitioner from the practice of law in the State of New York for a period of three years. A history of the proceedings subsequent to the order of suspension is recited in the petition.

Statement of the Facts

Although a statement of the facts is contained in the petition, respondent finds it necessary, in accordance with Rule 40 (3) of the Revised Rules of this Court, to submit a supplemental statement setting forth additional facts which, in respondent's view, are essential to a determination of the petition.

The petition seeks to leave the impression that petitioner was disbarred on the basis of a record devoid of any affirmative evidence of the misconduct charged. This claim can only be described as a gross misrepresentation of the proceeding and requires respondent to demonstrate the overwhelming evidence adduced.

Petitioner, in substance, admitted in his answer to respondent's charge letter (Pet. Ex. 2)* the payments to Mexican public officials and a Mexican national upon which the charge was predicated but denied any impropriety, contending that he had relied upon an associate familiar with procedures in Mexico who had approved all aspects of the Mexican litigation.

The evidence submitted to the Referee consisted of the testimony of Mrs. Mae Korn, an attorney retained of counsel by petitioner, the testimony of petitioner taken before respondent's Committee on Grievances, the admissions contained in petitioner's answer to the charge letter served by respondent's Committee on Grievances, and a number of lengthy and complicated documents. The Mexican public officials and the Mexican national who received the payments from petitioner which are the subject of the

* Respondent here was petitioner below and vice versa.

charge were outside the Court's subpoena jurisdiction and were unavailable to both petitioner and respondent. The foregoing evidence establishes the following:

In the fall of 1961, petitioner was retained by Lewis S. Rosenstiel to represent him with respect to his marital difficulties with his wife, Susan Liss Rosenstiel, and, specifically, to obtain a divorce or annulment of the marriage, if possible. Subsequent to that retainer, petitioner employed other attorneys, including Mrs. Mae Korn, to assist him of counsel (Pet. Ex. 2).

In or about November 1961, petitioner sent Mrs. Korn to Mexico to investigate the validity of Mrs. Rosenstiel's divorce from her former husband, Felix Kaufmann, which had been obtained on or about October 2, 1954, in the First Civil Court of the District of Bravos, State of Chihuahua (hereinafter referred to as the "Kaufmann decree") (Min. p. 34). Mrs. Korn thereafter advised petitioner that her investigation disclosed facts concerning the circumstances surrounding the Kaufmann decree which indicated that it had been improperly obtained; that grounds existed to institute an action to have it declared invalid; and that if the Kaufmann decree were nullified, Mr. Rosenstiel, respondent's client, could obtain an annulment of his marriage upon the ground that he and Mrs. Rosenstiel were never legally married since she was still the wife of Felix Kaufmann (Pet. Exs. 4, 5 & 6).

Mrs. Korn consulted a prominent Mexican law firm, Basham, Ringe & Correa, Esqs., in connection with her investigation of the validity of the Kaufmann decree (Pet. Exs. 5 & 6). In late January and early February, 1962, Mrs. Korn inquired of the Correa firm concerning the possibility of bringing an action to vacate the Kaufmann de-

cree ex parte and/or calling the alleged irregularities in the obtaining of the Kaufmann decree to the attention of a Mexican public official in order to have him institute nullification proceedings on his own motion upon the ground that it had been obtained by fraud perpetrated against the Mexican Courts. In response to these inquiries, Mrs. Korn was advised that no government official would institute such an action and that an action to nullify the Kaufmann decree should properly be brought by Mr. Rosenstiel upon actual notice to all parties, including Mrs. Rosenstiel, and that such an action, if contested, might take two or more years (Pet. Ex. 5; Min. p. 52). Mrs. Korn subsequently conveyed this advice to petitioner who, in turn, informed his client, Lewis S. Rosenstiel (Min. p. 52; Pet. Ex. 12, p. 420).

When Mr. Rosenstiel expressed strong dissatisfaction with the estimated length of time necessary to obtain nullification of the Kaufmann decree (Pet. Ex. 12, p. 420), one Carmen Lopez Figueroa, a Mexican laywoman associated with Amalia Castillo Ledon, a member of the Mexican Cabinet, was hired to assist in the efforts to nullify the Kaufmann decree. Petitioner described her services as "public relations" but was unable to furnish any meaningful explanation for that term (Pet. Ex. 12, pp. 330-1). It was apparent from the services actually rendered by Miss Figueroa that she was hired to use her social and political connections in Mexico to expedite the obtaining of a nullification of the Kaufmann decree.

Miss Figueroa communicated with Jose Luis Sequerios, Esq., then Lieutenant Governor and Attorney General of the State of Chihuahua where the Kaufmann decree had been obtained. On February 26, 1962, a check in the

amount of $10,000 was drawn on petitioner's firm account at the Chemical Bank New York Trust Company in payment of a bank draft in that amount payable to Sequerios (Pet. Ex. 2). Thus, no cancelled check disclosing this payment appeared in petitioner's file.

On February 28, 1962, Mrs. Korn and Miss Figueroa traveled to Mexico to meet Sequerios. Mrs. Korn was under the impression that she was to see Sequerios in his dual capacity as Attorney General of the State of Chihuahua and a Mexican attorney, to take steps to nullify the Kaufmann decree. She had not been informed of any arrangement between the petitioner and Sequerios even though she had spoken to the petitioner about her contemplated trip to Mexico on February 27, 1962. Furthermore, she was not informed of the existence of the $10,000 bank draft payable to Sequerios which was delivered to Sequerios by Miss Figueroa on March 1, 1962.

Several days after the payment of the $10,000 to him, Sequerios turned over to Mrs. Korn and Miss Figueroa a decree (hereinafter referred to as the "Goldsmith decree"), dated February 6, 1962 (one month earlier), purporting to nullify the Kaufmann decree upon the petition, dated January 31, 1962, of one "Samuel Goldsmith", a third party who contended that he had been a creditor of the Kaufmanns and had been defrauded by their divorce in 1954 (Min. pp. 89-90; Pet. Ex. 8). The Goldsmith decree had been obtained without notice to Mrs. Rosenstiel other than the alleged posting of the petition on the courthouse bulletin board in Juarez, Mexico, for a period of three days.

The appearance of the Goldsmith decree some eight years after the Kaufmann divorce was granted, at pre-

cisely the time that petitioner was seeking to vacate the Kaufmann divorce and immediately after the hiring of Miss Figueroa and the payment of $10,000 to Sequerios, strongly suggested that these events were related. Further proof that the Goldsmith decree was manufactured by Sequerios in return for the $10,000 payment was provided by Mrs. Korn's testimony that when she inspected the Kaufmann divorce file on January 31, 1962, in Juarez, she found no evidence of the Goldsmith petition or that the Kaufmann decree was then under attack from any source.

Petitioner contended before respondent's Committee on Grievances that the $10,000 had been paid to Sequerios in February 1962, to retain him to obtain a nullification of the Kaufmann decree (Pet. Ex. 12, p. 334). Although petitioner did not categorically concede that the Goldsmith decree was produced by Sequerios in return for that $10,000 payment (a concession which would have constituted a virtual admission of the charge), it is clear that petitioner accepted the Goldsmith decree as value received for that payment. Thus, in April 1962, only two months later, he paid Sequerios an additional $500 merely to keep him informed of any development in Mexico concerning the Goldsmith decree, a service for which no payment would have been made if petitioner did not consider the previously paid $10,000 to have already been earned (Pet. Ex. 12, p. 391).

Petitioner had on an earlier occasion sought to avoid the damaging implication of any admission linking the monies paid to Sequerios and the Goldsmith decree. Thus, in 1965, in the course of an examination before trial in an action brought against him by his client, Rosenstiel, for an accounting, in which the client contended that petitioner had used monies made available to him to improperly

obtain the Goldsmith decree, petitioner testified under oath that Sequerios had not been retained until after the Goldsmith decree had been issued and that the purpose of the retainer was merely to sustain that decree against attack by Mrs. Rosenstiel (Pet. Ex. 12, pp. 388-90). That testimony not only contradicts petitioner's testimony before the referee but is inconsistent with known facts. Thus, it is conceded that on February 26, 1962, the date the bank draft for Sequerios was purchased, neither petitioner nor anyone associated with him was aware of the Goldsmith decree and that Mr. Rosenstiel's attack upon that decree was not initiated until early June 1962.

On March 8, 1962, Mrs. Korn and Miss Figueroa returned to New York and delivered the Goldsmith decree to petitioner. On that same day, Miss Figueroa was paid $10,000, some $6,000 of which was paid by check issued by petitioner payable to Mrs. Korn for "disbursements" (Pet. Ex. 12, pp. 370-72). The ultimate recipient of the payment was thereby concealed. This sizable payment itself indicates that petitioner accepted the Goldsmith decree as the product of Miss Figueroa's efforts. Petitioner denied this, contending that Miss Figueroa was to be paid only $100 to $200 per week and that the payment in question was to reimburse her for expenses incurred in traveling to Mexico. He conceded on cross-examination, however, that he had repeatedly described the payment to Miss Figueroa as a fee in the subsequent action for an accounting instituted by Rosenstiel (Pet. Ex. 12, p. 372).

Petitioner, aware that Mrs. Rosenstiel had no actual notice of the Goldsmith decree, amended the complaint in a pending separation action instituted by him in New York on behalf of Mr. Rosenstiel to state a cause of action for

annulment upon the ground that Mrs. Rosenstiel's Mexican divorce from her prior husband was invalid. He testified that he had hoped to use the Goldsmith decree to substantiate that claim before Mrs. Rosenstiel's attorneys learned of its existence and instituted proceedings to vacate it. Petitioner thereby implied his awareness that the Goldsmith decree was vulnerable to attack (Pet. Ex. 12, pp. 358-59).

In the meantime, Sequerios continued to receive payments from petitioner. In addition to the previously mentioned $500 paid in April of 1962, Sequerios was paid an additional $5,000 in May 1962, to obtain affidavits from the attorneys who had represented the Kaufmanns in procuring their divorce in 1954 (Pet. Ex. 12, pp. 391-2). These affidavits were intended to substantiate grounds for attacking the Kaufmann decree advocated by Mrs. Korn but not included in the Goldsmith decree which might be useful in the event the Goldsmith decree were successfully attacked and, it, therefore, became necessary to initiate the orthodox proceeding to vacate the Kaufmann divorce originally advocated by Basham, Ringe & Correa, Esqs. These continued efforts to obtain additional evidence warranting the nullification of the Kaufmann decree even before the Goldsmith decree was challenged, further evidence petitioner's awareness that the Goldsmith decree would not withstand scrutiny.

In June 1962, Mrs. Rosenstiel's New York attorneys learned of the existence of the Goldsmith decree and, through Mexican counsel retained by them, instituted what is known as an amparo proceeding to vacate that decree (Pet. Ex. 12, p. 342). Petitioner retained the firm of Lopez, Figueroa & Valenzuela, Esqs., to defend the amparo action brought by Mrs. Rosenstiel (Pet. Ex. 12, pp. 342-3).

Inasmuch as Mr. Rosenstiel had not been a party to the Goldsmith proceeding, he apparently had no standing to appear in the amparo action. Valenzuela, the attorney retained by petitioner, filed a notice of appearance on behalf of Goldsmith although petitioner admitted that Valenzuela had no authority to do so and the Samuel Goldsmith who allegedly procured the Goldsmith decree never appeared (Pet. Ex. 12, pp. 345-7).

Petitioner contended that he had not known at the time that Valenzuela was filing an appearance on behalf of Goldsmith without authority and did not become aware thereof until January 1963 (Pet. Ex. 11, p. 273). He conceded, however, that even after he became aware of it, he acquiesced in Valenzuela's continued participation in the amparo action in Goldsmith's name, claiming that this was a "convenience" and not a fraud upon the court affecting the validity of the proceeding (Pet. Ex. 11, p. 276). Respondent was, however, unable to reconcile this attitude towards Valenzuela's completely unauthorized appearance with the advice he had received from Mrs. Korn in the fall of 1961, that one of the principal infirmities in the Kaufmann decree demonstrating its nullity was the fact that Mrs. Kaufmann had allegedly signed the power of attorney authorizing a Mexican attorney to appear for her in the divorce action in blank without designating the specific attorney who was to represent her. If petitioner, therefore, was aware that under Mexican law an authorization to an attorney to appear admittedly signed by the client but not specifying the attorney invalidated the proceeding, he could hardly have believed that an authorization of which the client had no knowledge could have any greater validity.

While the amparo action was pending in the Mexican courts, petitioner paid Miss Figueroa the sum of $3,000 to be used as a contribution to a charity in which Miss Ledon, the member of the Mexican Cabinet, was interested in order to obtain "a favorable public relations climate" on behalf of his client. This sum was ultimately charged to the client as a disbursement in the Mexican action (Pet. Exs. 18, 12, pp. 382-3). Thereafter, petitioner paid Miss Ledon's hotel bill at the Hotel St. Regis in New York in the amount of $1,482.11, which he charged to his client for "public relations" related to the Mexican litigation (Pet. Ex. 11, p. 256). Petitioner could give no explanation for these payments and their relation to the Mexican action other than to state that at one time Miss Ledon had given a party at which he had the occasion to meet important Mexican officials including many of the judges in the federal court in which the amparo action was pending (Pet. Ex. 12, 379-81).

In March 1963, while a determination of the amparo was pending, petitioner was discharged by his client (Pet. Ex. 12, p. 348). On May 10, 1963, the Mexican Court set aside the Goldsmith decree upon the ground that it had been obtained in violation of Mrs. Rosenstiel's constitutional rights (Pet. Ex. 16).

Prior to the determination of the amparo proceeding, Mrs. Rosenstiel's New York attorneys filed affidavits in the separation action pending in New York alleging that petitioner had fraudulently procured the Goldsmith decree by paying bribes to Mexican officials (Pet. Ex. 12, p. 399). Similar allegations were subsequently made by Rosenstiel in an action instituted against petitioner for an accounting of all funds paid to him. Petitioner conceded that

despite these accusations, and the charge instituted against him by the Committee on Grievances, he never attempted to locate the Samuel Goldsmith in whose name the Goldsmith decree had allegedly been obtained to demonstrate that such a person truly existed and had never caused any independent investigation to be made of the circumstances surrounding the issuance of the Goldsmith decree (Pet. Ex. 12, pp. 399-401). Furthermore, even though petitioner testified that the Rosenstiel matter was the principal case in his office he testified that he never even read the Goldsmith decree (Pet. Ex. 12, pp. 352, 404).

Petitioner contended that he had relied upon Sol A. Rosenblatt, Esq., an attorney from whom he rented offices and who had been retained to assist in representing Mr. Rosenstiel, for advice concerning the proper steps to take with respect to the Mexican aspects of the matter (Pet. Ex. 2). Petitioner conceded, however, that in the later action for an accounting brought by Mr. Rosenstiel, petitioner submitted a sworn bill of particulars in which fees paid to Rosenblatt were described as payment for services unrelated to the Mexican litigation (Pet. Ex. 12, pp. 353-7; Pet. Ex. 18). Mr. Rosenblatt died in May 1968, shortly before the hearings before the Committee on Grievances commenced and was not available to testify.

The evidence demonstrates that the Mexican litigation was characterized by efforts to obtain results sought by petitioner through the use of a fictitious individual, Samuel Goldsmith. Thus, immediately upon learning that an orthodox attack upon the Kaufmann decree would take some years, petitioner began making payments to Mexican nationals, including public officials, who promptly produced the fraudulent Goldsmith decree vacating the Kaufmann

divorce. Thereafter, when the validity of the Goldsmith decree was attacked, attorneys employed by petitioner filed an appearance on behalf of Goldsmith although unauthorized to do so and proceeded to defend the decree in his name.

Petitioner not only acquiesced in these improper activities but personally participated in many aspects. His failure to conduct any investigation into these events, even when faced with charges that he personally engineered the fraud, further demonstrates that he was fully aware of the improprieties and sanctioned them. This is still further demonstrated by the lack of candor which characterized his testimony before the Committee on Grievances, the inconsistent answers which he gave when questioned about the underlying events in this and other proceedings and his inability to furnish any legitimate explanation for the role played by the various Mexican nationals to whom he made payments on behalf of his client.

In these circumstances, petitioner's claim that he relied upon Rosenblatt is really immaterial, for his acquiescence and participation in the procuring of a fraudulent decree nullifying the Kaufmann divorce was improper, whether done in concert with Rosenblatt or by petitioner alone.

ARGUMENT

I.

A disciplinary proceeding is not a criminal case within the meaning of the constitution.

The essentially civil nature of this licensing procedure has long been established, *Ex Parte Wall,* 107 U.S. 265, 288 (1882). To hold, as petitioner contends, that a disciplinary proceeding is in essence a criminal case, would require the courts to continue to certify to the public, and to require the public as a practical matter to continue to rely upon, attorneys whose conduct has been called into question and against whom the weight of the evidence demonstrates that there is no justification for such continued certification or reliance. In an era when confidence in the instrumentalities of the administration of justice in general and the integrity of the Bar in particular are more and more called into question such a radical lowering of standards would be intolerable. Moreover, such a holding would inevitably similarly affect any license revocation proceeding, whether it involved an attorney, a barber or a licensed retailer.

To hold that a disciplinary proceeding is a criminal case would lead to further undesirable ramifications. Attorneys who are the subject of complaints could refuse to respond to questions the answers to which might simply subject them to discipline and did not involve criminal conduct in the usual sense. The right of the courts to police their own officers might be totally undermined, because of the requirement of trial by jury in criminal cases.

The Rules of this Court concerning the discipline of its own Bar graphically demonstrates that such result was

never contemplated. Thus, where it is shown to this Court that any member of its Bar has been guilty of misconduct, he is forthwith suspended from practice and thereupon offered the opportunity to show good cause why he should not be disbarred (Revised Rule 8). Contrary to the procedure applicable in criminal cases, the "accused" is thereby required to come forward to explain his conduct.

A disciplinary proceeding is, in essence, nothing more than a licensing hearing in which facts surrounding the conduct of the person accused are examined to determine whether he is entitled to a continuation of the license which, in the case of an attorney, grants him an absolute monopoly to provide access to the lay public to the administration of justice and to exercise the awesome powers attendant thereto.

The license to practice law constitutes a certification to the public that the holder has been examined with respect to both character and learning and has been found to be reliable. Clients must rely upon this certification, for they have no means whereby they can make this determination by themselves. When that certification and the holder's entitlement thereto is called into question, a disciplinary proceeding is the means by which the continued fitness of the holder is determined. Such proceeding does not seek to deprive the attorney of his liberty.

II.

Petitioner was not denied procedural due process.

Petitioner relies upon *In Re Ruffalo,* 390 U.S. 544 (1968). There an attorney was charged with twelve separate counts of misconduct. In the course of the subsequent hearing, the attorney testified in his own defense and, thereafter, solely on the basis of that testimony and the testimony of another witness, an additional charge of misconduct was added over the objection of the attorney's counsel. Thereafter, the Supreme Court of Ohio sustained only two of the thirteen charges, one of these being the charge added after the attorney's testimony, and suspended the attorney indefinitely.

In a subsequent disciplinary proceeding in the United States Court of Appeals for the Sixth Circuit predicated upon the state disciplinary action, the only charge considered was the one added following the attorney's testimony. This Court held that the discipline of the attorney predicated upon testimony which he had given in defense of the original charges violated procedural due process in that the attorney "had no notice that [the conduct admitted in his testimony] would be considered a disbarment offense until *after* both he and [a witness] had testified at length on all the material facts pertaining to this phase of the case", 390 U.S. 544, 550-1.

No charges were added in this proceeding predicated upon petitioner's testimony.

Petitioner contends that in his opinion, the Appellate Division found him guilty of a charge not made against him.

The petition which instituted the disciplinary proceeding in the Appellate Division contained a preamble together with twenty specifications of acts which constituted the professional misconduct charges preferred against petitioner. Evidence was introduced during the course of the hearing in support of the specifications alleged in the petition. The Appellate Division, in rendering its decision, reviewed the evidence which had been introduced during the course of the proceeding both by petitioner and respondent. Petitioner had been served with a copy of the petition and he knew exactly what the acts were that he was alleged to have committed which constituted the professional misconduct alleged in the petition. Petitioner had every opportunity to defend against said alleged acts and, in fact, did offer a defense to the allegations contained in the petition. The basic question to be determined by both the Referee appointed by the Appellate Division and the Appellate Division itself was whether petitioner had committed the alleged acts of professional misconduct. A reading of the Referee's Report, together with the Appellate Division's opinion, clearly reveals that petitioner was found to have committed the alleged acts of professional misconduct. There is nothing in the opinion of the Appellate Division which tends to find that petitioner was also found guilty of other charges not presented to the Court below.

There is no basis whatever for stating that the Appellate Division did not sustain the charges in the petition but found petitioner guilty of charges not contained in the petition. The Court, in its opinion, stated, and correctly so, that the charges against petitioner were "that the respondent 'has been guilty of attempting to perpetrate a fraud upon the Courts of Mexico and the United States by paying

monies to Mexican public officials and another Mexican national in order to improperly obtain and subsequently defend a nullification of a Mexican divorce decree' ". Later on in its opinion the Court stated that "the referee has rendered a report sustaining the charges and his report has been filed with this Court". The Court then stated that "the findings of fact and the report of the referee are confirmed". Judge McNally stated in his opinion that "the record amply supports the report of the learned referee, the Hon. George Trosk, in his conclusion that respondent attempted to perpetrate a fraud upon the Governments of Mexico and the United States by paying monies to Mexican public officials and a Mexican national in order to improperly obtain and subsequently defend a nullification of a Mexican divorce decree". It is axiomatic that since Judge McNally's dissent concerned the question of discipline imposed by the majority rather than his sustaining of the charges that he was of the opinion that the majority had sustained the charges contained in the petition. In addition, the misconduct of which the Court found the petitioner guilty was all contained in the petition which detailed what transpired in the perpetration of the attempted fraud.

Petitioner's counsel relies upon the following language from the Court's opinion:

> "The evidence, within the framework of the charges, does establish serious professional misconduct and a course of conduct intending to exert improper personal influence upon the courts, and a lack of candor and fairness with the courts, in fostering unjustified and questionable litigation and defenses, in the improper solicitation of employment and, in general, in conduct de-

signed to bring dishonor upon the courts and on the administration of justice (see Canons 3, 15, 22, 27, 29, 30, 31 and 32 of the Canons of Professional Ethics)."

The argument has been made by petitioner's counsel that the Court, in the above-quoted language, found the petitioner guilty of misconduct not charged in the petition. The fact that the Court cited four Canons which were not contained in the charge letter is of no consequence since the Court sustained the charges of professional misconduct recited in both the charge letter and the petition.

The conclusions the Court referred to in the language quoted, *supra,* are neither inconsistent with nor in addition to the charges contained in the petition. The charges of misconduct are detailed in paragraph IV of the petition and contain 20 sub-paragraphs which allege what transpired in the perpetration of the attempted fraud. These sub-paragraphs contain allegations of fact which when proved by the evidence to the satisfaction of the Court justify the Court in arriving at the conclusions set forth in the quoted language.

III.

Appellate review of the order imposing discipline was available to petitioner.

Petitioner contends that New York law does not have a procedure whereby he would be entitled to obtain appellate review of the order imposing discipline. This proposition is not correct. As petitioner himself has indicated in his Brief, he has on several occasions sought to have the highest Court of the State of New York, the Court of Appeals, review the issues which he is now presenting to this Court. The procedural due process point which petitioner raises in his Brief, namely the applicability of this Court's holding in *Matter of Ruffalo, supra,* was raised by petitioner each time he applied to the Court of Appeals for permission to appeal to that Court on the ground that his constitutional rights were violated by the Appellate Division. The argument that petitioner now makes to this Court concerning the alleged violation of his constitutional rights was made to the Court of Appeals on each occasion he applied to that Court. In denying each of petitioner's applications, it is obvious that the Court of Appeals concluded that petitioner's constitutional rights were not violated by the Appellate Division and that no substantial constitutional question had been presented to the Court of Appeals for review. Petitioner's contention that the Court of Appeals either ignored or rejected this Court's holding in *Matter of Ruffalo, supra,* is competely erroneous. Petitioner fully developed his argument in making application to the Court of Appeals and, in fact, submitted the same argument to that Court as he is now submitting to this Court.

The very statutes which petitioner cites in his Brief, permits him to have the Appellate Review of the order imposing discipline. Petitioner availed himself of the procedures under New York law and inasmuch as there was no substantial constitutional question involved with respect to the grounds for his appeal, the Court of Appeals refused to grant him permission to appeal. Petitioner's appeal as of right was dismissed by the Court of Appeals since no substantial constitutional questions were involved.

The appellate procedures of the State of New York were available to petitioner but it is apparent that the legal arguments he propounded and submitted to the Court of Appeals did not sufficiently impress that Court as requiring the appellate review petitioner sought.

IV.

Petitioner raises the equal protection argument for the first time in this Court.

At no time in any of the proceedings in the Courts of the State of New York has petitioner contended that he has been denied the equal protection of the laws of the State of New York and that his constitutional rights under Amendment XIV of the United States Constitution were violated.

In these circumstances, it is respectfully submitted that the jurisdiction of this Court has not been preserved since it does not affirmably appear from the record that the federal question here urged for the first time was presented to the State Courts, *Lynch et al.* v. *N. Y. ex rel. Pierson*, 293 U.S. 52; *Ellis* v. *Dixon et al., Members of the Board of Education of the City of Yonkers*, 349 U.S. 458.

In any event, as was shown above, petitioner did have appellate review of the order imposing discipline available to him and he attempted to obtain such review from the highest Court of the State of New York and that on each occasion, that Court determined that there were no grounds for such appellate review of the order imposing discipline.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN G. BONOMI
Attorney for Respondent
The Association of the Bar
of the City of New York
Office & P.O. Address
36 West 44th Street
New York, New York 10036
(212) MU 2-0606